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No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

**WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION,**

*Petitioners,*

v.

**BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION,**

*Respondent.*

**On Petition for a Writ of Certiorari to the Appellate Court of Illinois for the First District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Plaintiffs twice invoked federal court jurisdiction based on diversity of citizenship. The federal court dismissed the second action with prejudice for plaintiff's failure to amend the complaint properly alleging diversity within the court-ordered time. Plaintiff then filed a third suit in state court and claimed for the first time that the federal court never had jurisdiction and its dismissal with prejudice was a void order. The state appellate court agreed and the state supreme court declined review. The questions presented for review are:

1. Whether a federal court's dismissal with prejudice for failure to comply with a court order is subject to collateral attack on the basis that it is void for want of diversity jurisdiction?

2. Assuming the federal court lacked subject matter jurisdiction, whether it had ancillary jurisdiction and the inherent power to dismiss the action with prejudice as a sanction, even though such a dismissal operates as an adjudication of the merits under Fed.R.Civ.P. 41(b)?

## LIST OF PARTIES

Pursuant to Rule 29.6, petitioners state that all the parties to this proceeding are listed in the caption. Petitioner Schindler Elevator Corporation is a wholly owned subsidiary of Schindler Enterprises, Inc., and has no partially-owned subsidiaries. Petitioner Westinghouse Electric Corporation does not have any parent corporations and its partially owned subsidiaries are:

Aeg-Beteiligungageesellschaft Mbh

Aeg-Westinghouse Transport-Systems Gebb

Aws Ansaldo, Spa

C & K Software, Ltd.

Computerized and Advanced Technologies Company

Contadoras Electrice S.A.

Escorts, Ltd.

Greenfield Environmental

Hellenia Business Development

Infrared Fiber Systems, Inc.

Jafco - Ltd. Partnership

Lor-West, Ltd.

Micros Systems Inc.

Powerex, Inc.

Remotec, Inc.

Siam Toracato de Tella, Ltd.

Turbinas T Generadores Turgenca C.A.

Vektron S.A.

W.S. Industries (India) Ltd.

Wb Bottling Corporation

Westinghouse Surveillance Systems Limited

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW .... | i |
| LIST OF PARTIES ..... | ii |
| TABLE OF AUTHORITIES ..... | vi |
| JUDGMENT BELOW ..... | 1 |
| STATEMENT OF JURISDICTION ..... | 2 |
| CONSTITUTIONAL PROVISION AND RULE INVOLVED ..... | 2 |
| STATEMENT OF THE CASE ..... | 3 |
| REASONS FOR GRANTING THE WRIT .... | 8 |
| I. The State Decision Conflicts with Established Federal Law that Diversity Jurisdiction Is Presumed to Have Been Found Where a Federal Court Adjudicates the Merits and Enters Final Judgment ..... | 8 |
| II. This Court Should Decide Whether Federal Courts Have the Inherent Authority to Adjudicate the Merits of an Action by Dismissing with Prejudice as a Sanction Even Where It Lacks Subject Matter Jurisdiction ..... | 16 |
| CONCLUSION ..... | 21 |

APPENDIX

*Board of Managers of Winston Tower No. 4 Condominium Association v. Westinghouse Electric Corp.*, Circuit Court of Cook County No. 92 L 15104, Illinois Appellate No. 1-93-2684, and Illinois Supreme Court No. 78441

Illinois Appellate Court order entered on December 21, 1994 ..... A1

Order of July 6, 1993, entered by Judge Flanagan of the Circuit Court of Cook County . A9

Report of proceedings of July 6, 1993, before the Circuit Court of Cook County ..... A11

Illinois Supreme Court order denying petition for leave to appeal entered on June 1, 1995 . A19

*Liberty Mutual Insurance Company v. Westinghouse Electric Corp.*, U.S. District Court for the Northern District of Illinois, No. 91 C 3147

Minute order of July 2, 1991, on status call .. A20

Minute order of September 3, 1991, granting defendants' motion to dismiss ..... A22

*Board of Managers of Winston Towers No. 4 Condominium Association v. Westinghouse Electric Corp.*, U.S. District Court for the Northern District of Illinois, No. 92 C 478

Excerpt of plaintiff's memorandum in support of opposition to defendants' motions to dismiss ..... A23

Minute order of July 9, 1992, dismissing the complaint without prejudice for lack of subject matter jurisdiction and granting until August 10, 1992, to file an amended complaint "properly asserting a basis for federal jurisdiction" . A30

Memorandum Opinion and Order of July 9, 1992 ..... A33

Minute order of September 24, 1992, dismissing the complaint with prejudice for plaintiff's failure to file an amended complaint ..... A43

Judgment entered on September 24, 1992 ... A46

## TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951) | 16 |
| *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) | 17, 18, 20 |
| *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) | 10, 14, 15 |
| *Commodities Export Co. v. U.S. Customs Service*, 957 F.2d 223 (6th Cir. 1992), *cert. denied*, 507 U.S. ____, 122 L.Ed.2d 654 (1993) | 13 |
| *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) | 18, 19 |
| *Costello v. United States*, 365 U.S. 265 (1961) | 20 |
| *Daewoo Electronics Corp. v. W. Auto Supply Co.*, 975 F.2d 474 (8th Cir. 1992) | 20 |
| *Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552 (1887) | 10, 14, 15 |
| *Disher v. Information Resources, Inc.*, 873 F.2d 136 (7th Cir. 1989) | 15 |
| *Durfee v. Duke*, 375 U.S. 106 (1963) | 15 |
| *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044 (7th Cir. 1987) | 8 |
| *Henderson v. Consol. Merchandising Corp.*, 286 F. Supp. 697 (N.D.Ga. 1968) | 20 |
| *Herb v. Pitcairn*, 324 U.S. 117, *supp. op.*, 325 U.S. 77 (1945) | 2 |
| *Hodge v. Hodge*, 621 F.2d 590 (3rd Cir. 1980) | 13 |

*Honneus v. Donovan*, 691 F.2d 1 (1st Cir. 1982) . 13

*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) ... 18

*Kansas City S. R. v. Great Lakes Carbon Corp.*, 624 F.2d 822 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980) ..... 13

*Kock v. Gov't of Virgin Islands*, 811 F.2d 240 (3d Cir. 1987) ..... 13

*Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) . 16, 17

*Lambert v. Conrad*, 536 F.2d 1183 (7th Cir. 1976) . 13

*LeBeau v. Taco Bell, Inc.*, 892 F.2d 605 (7th Cir. 1989) ..... 20

*Link v. Wabash R. Co.*, 370 U.S. 626 (1962) ... 17, 18

*M'Cormick v. Sullivant*, 23 U.S. (10 Wheat) 192 (1825) ..... 9, 10, 14, 15

*Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) ..... 15

*Mitchell v. Comm'n on Adult Entertainment Establishments*, 12 F.3d 406 (3d Cir. 1993) .... 13

*Moser v. Universal Eng. Corp.*, 11 F.3d 720 (7th Cir. 1993) ..... 18

*Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986) .. 13

*Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978) ..... 17

*Pacurar v. Hernly*, 611 F.2d 179 (7th Cir. 1979) . 14

*Proctor v. Millar Elevator Serv. Co.* 8 F.3d 824 (D.C. Cir. 1993) ..... 20

*Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977) ..... 8

*Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.*, 198 U.S. 188 (1905) ..... 12

*Skillern's Executors v. May's Executors*, 10 U.S. (6 Cranch) 267 (1810) ..... 9, 14, 15

*Stoll v. Gottlieb*, 305 U.S. 165 (1938) ..... 10, 16

*United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) ..... 17

*United States v. United Mine Workers*, 330 U.S. 258 (1947) ..... 15

*Willy v. Coastal Corp.*, 503 U.S. 131 (1992) ... ..... 16, 19, 20

*Windholz v. Everett*, 74 F.2d 834 (4th Cir. 1935) . 13

OTHER AUTHORITIES

U.S. CONSTITUTION Art. III sec. 2 ..... 2, 18

Fed.R.Civ.P. 11 ..... 18, 19

Fed.R.Civ.P. 41(b) ..... 2-3, 16, 20

Fed.R.Civ.P. 60(b)(4) ..... 14

18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4428 (1981) ..... 13

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v.

**BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION,**

*Respondent.*

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**On Petition for a Writ of Certiorari to the Appellate Court of Illinois for the First District**

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Westinghouse Electric Corporation and Schindler Elevator Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois for the First Judicial District entered in the above entitled proceeding on December 21, 1994.

## JUDGMENT BELOW

The unpublished decision of the Appellate Court of Illinois is reprinted in the appendix at A1-8. The Illinois Supreme Court denied the petition for leave to appeal,

which is published at 162 Ill.2d 564, 652 N.E.2d 338 (1995) and is reprinted in the appendix at A19. The decision of the Circuit Court of Cook County is reprinted at A9-18.

## STATEMENT OF JURISDICTION

The Appellate Court of Illinois for the First Judicial District entered its order on December 21, 1994 (App. A1). The Illinois Supreme Court denied leave to appeal on June 1, 1995 (App. A19). On August 14, 1995, Justice Stevens granted an extension of time in which to file a petition for a writ of certiorari until October 11, 1995.

This Court has jurisdiction because this appeal involves federal questions which the state appellate court wrongly decided. Supreme Court Rule 10; *Herb v. Pitcairn*, 324 U.S. 117, 125-26, *supp. op.*, 325 U.S. 77 (1945), *overruled in part on other grounds, Michigan v. Long*, 463 U.S. 1032 (1983).

## CONSTITUTIONAL PROVISION AND RULE INVOLVED

Article III, section 2 of the United States Constitution provides, in part:

> The judicial Power shall extend . . . to Controversies . . . between citizens of different States; . . .

Rule 41(b) of the Federal Rules of Civil Procedure provides:

> **(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim

against the defendant. Unless the court in its order for dismissal otherwise specified, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

## STATEMENT OF THE CASE

On April 22, 1989, there was a fire which allegedly originated in the elevator control panel at Winston Towers condominiums. This fire spawned three lawsuits by the respondent condominium association or its insurer against petitioners. Petitioners seek review of a state appellate court decision which held that the federal court's dismissal with prejudice of the second law suit was not an adjudication on the merits and the doctrine of *res judicata* did not preclude the filing of the third lawsuit in state court.

### Plaintiff Twice Invokes the Jurisdiction of the United States District Court

Liberty Mutual Insurance Company, as subrogee of Winston Towers, No. 4 Association, filed a complaint in federal court asserting diversity jurisdiction for alleged damages from a fire (R. C86-88). Plaintiff did not appear at a hearing and the district court warned that failure to appear in the future would result in dismissal for want of prosecution (App. A20). Plaintiff then failed to file a response to defendant's motion to dismiss and this unopposed motion was granted (App. A22). Plaintiff moved to vacate the dismissal and asked leave to voluntarily dis-

miss, which the district court allowed, and the first action was voluntarily dismissed (R. C59).

Plaintiff refiled the same claim, again in federal court, this time in the name of the subrogor, Board of Managers of Winston Towers No. 4 Condominium Association. Plaintiff again asserted diversity jurisdiction (R. C33-34). Defendants moved to dismiss for, *inter alia*, failure to properly allege diversity jurisdiction. In response, plaintiff noted that it was not defendants' position that diversity was lacking, but that the complaint omitted "a few particular words" to plead diversity (App. A26). Plaintiff argued any error could be cured by amending the complaint to make further allegations on diversity (App. A27).

The district court held:

> The court finds that [plaintiff] has failed to properly allege diversity jurisdiction. Although the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, [plaintiff] can easily file an amended complaint to sufficiently clarify the ambiguity.

(App. A35). It granted defendants' motion which challenged the sufficiency of the jurisdictional allegations, dismissed the complaint, and allowed plaintiff leave "to file an amended complaint properly asserting a basis for federal jurisdiction," but warning: "Failure to file within thirty days will result in dismissal of plaintiff's claim" (App. A41-42).

Plaintiff did not file an amended complaint nor did it seek leave to voluntarily dismiss the action on the basis that it could not establish diversity. Instead, plaintiff ignored this order, and the district court *sua sponte* dis-

missed the action "*with prejudice* pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" and entered judgment (App. A46, emphasis added). Plaintiff did not appeal.

**Plaintiff Files a Third Suit in State Court and the Trial Court Holds that It Will Not Permit a Collateral Attack on the Federal Dismissal with Prejudice**

Plaintiff filed a third time in state court (R. C2). This complaint is virtually identical[1] to the second complaint filed in federal court which had been dismissed "with prejudice" (R. C2-8, C25-31). It named the same parties and made the same allegations of negligence (R. C2-8, C25-31).

Defendants moved to dismiss based on the doctrine of *res judicata*, arguing that the federal court dismissal with prejudice was a final adjudication on the merits under Fed.R.Civ.P. 41(b) which barred relitigation in state court (R. C22). Defendants explained:

> Federal courts apply the doctrine of *res judicata* where a trial court *sua sponte* dismissed the first action with prejudice. *Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1087 (3d Cir. 1988). A federal trial court has the inherent authority to enter an order involuntarily dismissing an action *sua sponte* where a litigant violates a court order or fails to prosecute. *Link v. Wabash R. Co.*, 370 U.S. 626, 629-31 (1962). Such an involuntary dis-

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[1] The sole differences between the federal and state complaints are the allegations relating to jurisdiction and damages (R. C25-31, C33-39).

> missal is with prejudice and is an adjudication on the merits under Fed.R.Civ.P. 41(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *Zaddack v. A.B. Dick Co.*, 773 F.2d 147, 150 (7th Cir. 1985). The doctrine of *res judicata* then precludes relitigation of that claim. *Napier*, 855 F.2d at 1087.

(R. C176). The state trial court agreed and told the plaintiffs:

> I am not going to sit here and you are not going to sit here and use the state court as a forum to attack an order in federal court. You cannot do it. The underlying philosophy is . . . [y]ou cannot use the state court as a forum to collaterally attack an order in the federal court which is clear on its face.
>
> * * *
>
> There was a certain specified period in which to file an amended complaint establishing diversity jurisdiction. That wasn't done. . . From the case law I read, the order in federal court, [Rule] 41(b) order, is an adjudication on the merits for purposes of *res judicata*, and a subsequent lawsuit filed in state court is barred.

(App. A15-16). The trial court dismissed plaintiff's third lawsuit on the ground it was barred by the doctrine of *res judicata* (App. A9, A15-16).

### The State Appellate Court Holds the Federal Dismissal with Prejudice Was Not a Binding Judgment

On appeal, plaintiff argued that the federal court, which jurisdiction it had twice invoked, never had jurisdiction and therefore the order dismissing its action with prejudice for failure to amend its complaint as ordered

was void (App. A2, A4). Defendants argued that federal courts have jurisdiction to determine their own jurisdiction and that they have the jurisdiction to dismiss actions with prejudice where a party fails to prosecute and/or violates a court order (App. A5). They argued that where, as here, the district court had not yet ruled on jurisdiction, the dismissal by the court was an adjudication on the merits under federal law (App. A5).

The appellate court reversed (A1-8). It held that the doctrine of *res judicata* did not bar this action because the federal court lacked subject matter jurisdiction and any federal court order entered without jurisdiction is a legal nullity (App. A6). It held that whether jurisdiction could have been established was "irrelevant" and, because the district court did not have jurisdiction in July (when it dismissed the complaint and granted leave to amend to properly allege diversity), it did not "magically obtain jurisdiction" thereafter in September (when it dismissed the action with prejudice for failure to comply with the federal order to file an amended complaint) (App. A6-7).

The Illinois Supreme Court denied leave to appeal. *Board of Managers of Winston Towers No. 4 Condominium Ass'n v. Westinghouse Elec. Corp.*, 162 Ill.2d 564, 652 N.E.2d 338 (1995) (App. A19).

## REASONS FOR GRANTING THE WRIT

### I.

### THE STATE DECISION CONFLICTS WITH ESTABLISHED FEDERAL LAW THAT DIVERSITY JURISDICTION IS PRESUMED TO HAVE BEEN FOUND WHERE A FEDERAL COURT ADJUDICATES THE MERITS AND ENTERS FINAL JUDGMENT

The holding of the state appellate court that the federal dismissal with prejudice was a nullity and did not bar the subsequently filed state court suit is contrary to the established precedent of this Court and circuit courts. The federal court's order is clear that it had not yet resolved whether diversity existed and it had not yet relinquished jurisdiction over the action (App. A35-36, A41-42).[2] Rather, it found that it had not been adequately pleaded and dismissed the complaint (App. A42). It

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[2] The July memorandum opinion and order is unequivocal that the action was not dismissed for lack of jurisdiction, rather for the failure to properly plead jurisdictional facts establishing diversity (App. A35, A41-42). The clerks in the Northern District of Illinois customarily use "minute order forms" (which are eventually computerized) to record the proceedings in court, including the filing of a motion or appearance, the setting of a briefing schedule, or the hearing or disposition of a motion (App. A20-22, A30-32). *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 812 F.2d 1044, 1045 (7th Cir. 1987); *Rappaport v. U.S.*, 557 F.2d 605 (7th Cir. 1977). When the clerk filled in the July 9 minute order form, he stated that the dismissal was "for lack of," and not for "failure to plead," jurisdiction (App. A32). However, the minute order form also refers the reader to the attached district court's memorandum opinion for "further detail" (App. A32 ¶11). Moreover, the clerk's entry makes it clear that the district court was retaining jurisdiction because it further allowed leave to amend to replead diversity (App. A32 ¶10).

retained jurisdiction over the action, granting leave to amend to properly plead diversity (App. A42).

Under the facts of this case, the district court had not finally determined that diversity jurisdiction did not exist, although jurisdiction had been challenged. Thus, the court is presumed to have had jurisdiction to enter subsequent orders and those orders are not subject to collateral attack. The subsequent order dismissing the action "with prejudice" for failure to comply with a prior order was not void for want of jurisdiction, as the state court held.

This Court has squarely held that failure to properly plead jurisdiction does not deprive a federal court of jurisdiction, and decisions rendered by that federal court are neither void nor subject to collateral attack. Attempts to relitigate that claim are barred under the doctrine of *res judicata*. In *Skillern's Executors v. May's Executors*, 10 U.S. (6 Cranch) 267 (1810), this Court held that the failure to plead diversity did not deprive the federal court of jurisdiction and the judgment previously rendered could be executed upon. It again held that federal judgments were not void, despite lack of allegations of diversity jurisdiction in *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat) 192 (1825). This Court explained that to argue that such judgments would be void in the absence of allegations establishing diversity, is premised

> upon an incorrect view of the character and jurisdiction of the inferior courts of the United States. They are all of limited jurisdiction; but they are not on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. *If the jurisdiction be not alleged in the proceedings, their judgments and decrees are errone-*

> *ous and may, upon a writ of error, or appeal, be reversed for that cause. But they are not absolute nullities.*

*M'Cormick*, 23 U.S. at 197 (emphasis added).

Over 100 years ago, this Court stated:

> It was settled by this court at a very early day that although the judgments and decrees of the circuit courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different States from the defendants, yet they were not nullities, and would bind the parties until reversed or otherwise set aside.

*Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U.S. 552, 557 (1887). *Accord Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (holding that the judgments of a court subsequently declared unconstitutional were not subject to collateral attack). Diversity of citizenship is a "quasi-jurisdictional fact" and, even if diversity does not actually exist, a judgment rendered by a federal court is not subject to collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938).

> Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. *Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. . .*

*Stoll*, 305 U.S. at 171-72 (emphasis added).

Here, the plaintiff twice filed in federal court, both times asserting that there was federal diversity jurisdic-

tion. When the sufficiency of the allegations regarding diversity were challenged in the second lawsuit, the plaintiff told the court that the defendant's motion did not raise a "substantive issue as to whether jurisdiction lies," but merely challenged the "choice of language" (App. A27-28). Plaintiff argued to the federal court that "any such error can be corrected by amending the complaint" (App. A27).

The federal court agreed and stated that although "the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, [plaintiff] can easily file an amended complaint to sufficiently clarify the ambiguity" and granted leave to amend (App. A35-36, A42). However, the July 9 order warned: "Failure to file [an amended complaint] within thirty days will result in dismissal of plaintiff's claim" (App. A42). After plaintiff ignored this order for over two months, the federal action was "dismissed with prejudice pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" (App. A46). The plaintiff then filed its action for the third time in state court, claiming for the first time that jurisdiction never had existed in the two federal actions.

This Court has expressly disapproved of a party's manipulation of our parallel court system, as the plaintiff has done here, and held that where a party seeks jurisdiction, it is bound by federal orders:

> It thus appears that a party carries on a litigation in a Federal court on its merits and, when beaten in that court, goes into a state court, and claims that, by reason of his own untruthful admission of citizenship, the Federal court assumed a jurisdiction which

> in fact it could not take, and that all the proceedings in that court must go for naught.
>
> * * *
>
> Where parties litigate in a Federal court, whose jurisdiction is invoked on the ground of diverse citizenship, . . . the judgment or decree which is entered is conclusive, and cannot be upset by either of them in any other tribunal on the mere ground that there was in fact no diverse citizenship.

*Riverdale Cotton Mills v. Alabama & Georgia Mfg. Co.*, 198 U.S. 188, 194-95, 197 (1905).

The appellate court's decision that the district court's orders were void and that it would not give full faith and credit to the district court's dismissal with prejudice is contrary not only to the decisions of this Court, but also to circuit court decisions, which routinely hold that a prior decision on the merits is binding and may not be collaterally attacked as void for lack of jurisdiction. As the Fourth Circuit explained:

> In every suit in a federal court, the question of jurisdiction is always present, whether expressly raised or not; and any ruling upon the merits carries with it by implication a ruling on jurisdiction, which, if erroneous, must ordinarily be corrected not later than the term at which judgment is rendered or while the cause is pending on appeal. But such error, even where federal jurisdiction does not appear upon the record, does not render the judgment absolutely void or subject it to collateral attack, if the parties are properly before the court and the cause is one within the general class of which the federal courts may take jurisdiction upon the existence of a specific basis therefor, such as diversity of citizenship or the fact that defendant is a federal officer.

*Windholz v. Everett*, 74 F.2d 834, 835 (4th Cir. 1935). *See also Hodge v. Hodge*, 621 F.2d 590, 592 (3rd Cir. 1980); *Commodities Export Co. v. U.S. Customs Service*, 957 F.2d 223, 226 (6th Cir. 1992), *cert. denied*, 507 U.S. ___, 122 L.Ed.2d 654 (1993); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982). *See generally* 18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4428 (1981).[3]

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[3] Federal courts refuse to permit collateral attacks and uphold the validity of federal orders, despite various jurisdictional irregularities, if a party failed to challenge jurisdiction in that proceeding. *Accord Mitchell v. Comm'n on Adult Entertainment Establishments*, 12 F.3d 406, 408-09 (3d Cir. 1993) (holding that the sovereign immunity defense under the Eleventh Amendment is "quasi-jurisdictional" and holding that "where nonwaivable subject matter jurisdiction is lacking but not raised, a final judgment has *res judicata* effect in a subsequent proceeding, and a collateral attack based on the want of subject matter jurisdiction is barred"); *Kock v. Gov't of Virgin Islands*, 811 F.2d 240, 243 (3d Cir. 1987) (holding that a decision was an adjudication on the merits despite failure to give timely notice, a jurisdictional prerequisite to bringing suit, and could not be collaterally attacked in a supplemental proceeding); *Nemaizer v. Baker*, 793 F.2d 58, 64 (2d Cir. 1986) (rejecting argument that a dismissal with prejudice was not an adjudication on the merits of state law claims for lack of jurisdiction because of federal preemption and holding that "[e]ven assuming that this case was not properly within the jurisdiction of the district court" and was improperly removed, a collateral attack of that court's exercise of jurisdiction would not be permitted in "the interest in finality of judgments"); *Lambert v. Conrad*, 536 F.2d 1183, 1185 (7th Cir. 1976) (holding that "a prior decision remains a bar to a future action even though it now appears that the court had no jurisdiction in the prior action" because an improper party was named); *Kansas City S. R. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980) (holding that a judgment is not void for lack of jurisdiction even though an indispensable party was not made a party).

In this case, the state appellate court, relying on *Pacurar v. Hernly*, 611 F.2d 179 (7th Cir. 1979), failed to recognize the difference between a finding that there had been a failure to plead jurisdiction and a finding that jurisdiction is lacking. With the former finding, the situation in this case, once a final order has been entered, that order may not be collaterally attacked on the ground it is void for lack of jurisdiction under *Skillern, M'Cormick* and *Des Moines Navigation*. With the latter, the situation in *Pacurar*, any dismissal after a determination that the district court lacks jurisdiction is, of course, without prejudice to bringing another suit.

It is black letter law that the doctrine of *res judicata* bars all claims that were brought or could have been brought, including jurisdictional challenges. *Chicot*, 308 U.S. at 378. If plaintiff had wanted to challenge the jurisdiction of the district court to dismiss its claim with prejudice for violation of a court order, plaintiff's option was to appeal or move to vacate under Fed.R.Civ.P. 60(b)(4). Judgments entered in cases where jurisdiction is not alleged may be reversed on appeal, "[b]ut they are not nullities." *Des Moines Navigation*, 123 U.S. at 558.

Under this Court's established precedent, it should summarily reverse the state appellate court and enter judgment for defendants. Having failed to appeal or move to vacate based on the lack of jurisdiction, plaintiff may not collaterally attack the federal order in state court, claiming for the first time that the federal court lacked jurisdiction. Plaintiff's belated excuse for ignoring the federal court order (that plaintiff could not allege diversity) is insufficient and does not avoid the preclusive effect of the federal judgment. Jurisdiction is for the

judiciary to decide. *Chicot*, 308 U.S. at 377. Public policy "dictates that there be an end of litigation" and therefore federal judgments, despite ambiguous jurisdiction, are not subject to collateral attack. *Durfee v. Duke*, 375 U.S. 106, 111 (1963).

The district court never relinquished jurisdiction by its July 9 order granting leave to amend to properly plead jurisdiction (App. A42). *Compare Disher v. Information Resources, Inc.*, 873 F.2d 136, 139-40 (7th Cir. 1989). The federal court was not deprived of jurisdiction or authority to dismiss the claim with prejudice when plaintiff ignored a federal court order merely because the stricken complaint did not properly allege a basis for diversity jurisdiction. Under *Skillern*, *M'Cormick*, and *Des Moines Navigation*, the federal court's jurisdiction is presumed and its orders are not subject to collateral attack for want of jurisdiction. Until a court finally determines it lacks jurisdiction over an action, it has the authority to enter orders in that case. *United States v. United Mine Workers*, 330 U.S. 258, 291-92 (1947).

Alternatively, this Court should accept this case for review because it involves important issues. First, it involves the doctrine of comity and our parallel systems of government. Federal courts give full faith and credit to state judgments and accord the same preclusive effect to them that a state court would give. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). Likewise, state courts must be required to give the same preclusive effect to federal judgments that federal courts would give them. Second, it involves the apparent conflict between two established principles of law. *Skillern*, *M'Cormick*, and progeny hold that diversity jurisdiction must be presumed, even where it is not

pleaded and does not exist, and cannot be collaterally attacked where a final order has been entered. *See also Stoll*, 305 U.S. at 171-72. Yet, on the other hand, federal jurisdiction cannot be created by judicial fiat, consent of the parties, or estoppel. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391, 395 (1994); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17-18 (1951). This Court should accept this case for review to resolve these issues.

## II.

## THIS COURT SHOULD DECIDE WHETHER FEDERAL COURTS HAVE THE INHERENT AUTHORITY TO ADJUDICATE THE MERITS OF AN ACTION BY DISMISSING WITH PREJUDICE AS A SANCTION EVEN WHERE IT LACKS SUBJECT MATTER JURISDICTION

Assuming, *arguendo*, the district court lacked diversity jurisdiction over the two federal actions filed by the plaintiff (as the plaintiff later contended in state court), the question then becomes whether a federal court has the ancillary jurisdiction to impose the sanction of dismissal with prejudice, which is an adjudication on the merits under Rule 41(b), even where that court did not have subject matter jurisdiction over the claim itself?

Federal courts are courts of limited jurisdiction and derive their jurisdictional power from the Constitution and statutes. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. ___, 114 S.Ct. 1673, 128 L.Ed.2d 391, 395 (1994), *citing Willy v. Coastal Corp.*, 503 U.S. 131 (1992). "[T]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded

nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

However, federal courts also possess certain inherent powers, or ancillary jurisdiction,[4] which exist for two purposes:

> (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent [citations]; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.

*Kokkonen*, 128 L.Ed.2d at 397. To effect the latter purpose, courts have upheld sanctions such as payment of attorney fees and contempt orders. *Kokkonen*, 128 L.Ed.2d at 397, *citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 n.8 (1991) *and United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). Federal courts also have the inherent authority to impose the severe sanction of dismissal for disregard of court orders or where a litigant fails to prosecute his claim. *Chambers*, 501 U.S. at 45, *citing Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962). A statutory basis is not required for such orders because a federal court's "inherent power extends to a full range of litigation abuses." *Chambers*, 501 U.S. at 46; *Link*, 370 U.S. at 630.

There is a necessary tension between a federal court's ancillary jurisdiction to dismiss an action as a sanction

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[4] This Court has described the power to sanction a party by dismissal of an action with prejudice as proper under its "inherent powers" (*Chambers v. NASCO, Inc.*, 501 U.S. 32, 47-48 (1991)) and under its "ancillary jurisdiction" (*Kokkonen*, 128 L.Ed.2d at 397).

and a federal court's limited diversity jurisdiction. The latter is, of course, a constitutional limitation. U.S. CONSTITUTION Art. III sec. 2. This Court has recognized the former as necessary so that federal courts can control their dockets and "achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. It is meant to be punitive. *Chambers*, 501 U.S. at 45; *Link*, 370 U.S. at 633-34. Finally, "[i]t is also a method of maintaining the integrity of judgments by preventing relitigation of the issues." *Moser v. Universal Eng. Corp.*, 11 F.3d 720, 725 (7th Cir. 1993).

Recently, this Court has twice held that federal courts have the power to impose sanctions on a party, despite lack of subject matter jurisdiction. However, in both cases, this Court has expressly noted that only collateral matters, and not the merits of the cases, were adjudicated.[5]

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990), a district court's sanction was upheld under Rule 11. The sanction was imposed after the claim had been voluntarily dismissed. Because there was no case or controversy pending before the court, it lacked subject matter jurisdiction over the merits of the case. This Court held that the district court had ancillary jurisdiction to sanction, despite the lack of jurisdiction, because

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[5] This Court has addressed this issue with regard to personal jurisdiction. It held that lack of personal jurisdiction is not a constraint in sanctioning a party by a dismissal under Rule 37, which is also an adjudication on the merits. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). In so holding, this Court expressly noted that personal jurisdiction, unlike subject matter jurisdiction, can be waived or consented to by the party. *Id.* at 702-04.

a Rule 11 proceeding is collateral to, and did not require an adjudication of, the merits. *Cooter & Gell*, 496 U.S. at 395.

Similarly, in *Willy v. Coastal Corp.*, this Court held that even though the district court erred in holding it had subject matter jurisdiction over the claim, this did not deprive the district court of the jurisdiction to impose a sanction under Rule 11. Again, one of the grounds of this Court's holding was that the collateral proceeding did not require an adjudication on the merits. *Willy*, 503 U.S. at 137-38. Because this Court found that the sanction was within the scope of the rules, it did not decide whether the sanction could "constitutionally be applied even when subject-matter jurisdiction is eventually found lacking" under the federal court's inherent powers. *Willy*, 503 U.S. at 139 n.5.

The important question presented in this case is whether a federal court has ancillary jurisdiction to impose the sanction of dismissal with prejudice, which operates as an adjudication on the merits, upon a party who invokes federal jurisdiction?

In the second federal lawsuit, the district court dismissed the complaint without prejudice for failure to properly plead subject matter jurisdiction (diversity) (App. A41-42). However, it did not dismiss the action. Instead, on July 9, it granted leave to replead and warned that if the plaintiff failed to file an amended complaint, the action would be dismissed with prejudice (App. A42). The plaintiff ignored the order and the district court dismissed the action and entered judgment, stating that the action was "dismissed with prejudice pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint" (App. A46).

Such an order is an adjudication on the merits under Fed.R.Civ.P. 41(b) and is not subject to collateral attack under the doctrine of *res judicata*. *Costello v. United States*, 365 U.S. 265, 286 (1961); *Proctor v. Millar Elevator Serv. Co.* 8 F.3d 824, 825 (D.C.Cir. 1993); *Daewoo Electronics Corp. v. W. Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir. 1992); *LeBeau v. Taco Bell, Inc.*, 892 F.2d 605, 608 (7th Cir. 1989); *Henderson v. Consol. Merchandising Corp.*, 286 F.Supp. 697 (N.D.Ga. 1968).

This Court should decide whether a federal court has ancillary jurisdiction to impose the sanction of dismissal which, under federal law, is an adjudication on the merits. Fed.R.Civ.P. 41(b). If the state court was correct that a federal court lacks the authority to dismiss the action with prejudice for a plaintiff's disregard of court order and failure to prosecute, then the sanction is toothless because it carries no consequences, other than to require refiling of the identical complaint. Yet, this Court has recognized that dismissal of an action is intended to be "a particularly severe sanction." *Chambers*, 501 U.S. at 45.

This important issue should be decided by this Court. As this Court has recognized, even where there is a determination that a court lacks subject matter jurisdiction, this "does not automatically wipe out all proceedings had in the district court" and the "interest in having rules of procedure obeyed . . . does not disappear upon a subsequent determination that the court was without subject matter jurisdiction." *Willy*, 503 U.S. at 137.

## CONCLUSION

For the foregoing reasons, petitioners Westinghouse Electric Corporation and Schindler Elevator Corporation pray this Court to grant this petition for a writ of certiorari, to reverse the Illinois Appellate Court for the First Judicial District and to affirm the Circuit Court of Cook County.

Respectfully submitted,

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October 11, 1995

## APPENDIX TABLE OF CONTENTS

PAGE

*Board of Managers of Winston Tower No. 4 Condominium Association v. Westinghouse Electric Corp.*, Circuit Court of Cook County No. 92 L 15104, Illinois Appellate No. 1-93-2684, and Illinois Supreme Court No. 78441

Illinois Appellate Court order entered on December 21, 1994 ..... A1

Order of July 6, 1993 entered by Judge Flanagan of the Circuit Court of Cook County . A9

Report of proceedings of July 6, 1993 before the Circuit Court of Cook County ..... A11

Illinois Supreme Court order denying petition for leave to appeal entered on June 1, 1995 . A19

*Liberty Mutual Insurance Company v. Westinghouse Electric Corp.*, U.S. District Court for the Northern District of Illinois, No. 91 C 3147

Minute order of July 2, 1991 on status call .. A20

Minute order of September 3, 1991 granting defendants' motion to dismiss ..... A22

*Board of Managers of Winston Towers No. 4 Condominium Association v. Westinghouse Electric Corp.*, U.S. District Court for the Northern District of Illinois, No. 92 C 478

Excerpt of Plaintiff's memorandum in support of opposition to defendants' motions to dismiss ..... A23

Minute order of July 9, 1992 dismissing the complaint without prejudice for lack of subject matter jurisdiction and granting until August 10, 1992 to file an amended complaint "properly asserting a basis for federal jurisdiction" . A30

Memorandum Opinion and Order of July 9, 1992 ..... A33

Minute order of September 24, 1992 dismissing the complaint with prejudice for plaintiff's failure to file an amended complaint ..... A43

Judgment entered on September 24, 1992 ... A46

THIRD DIVISION
December 21, 1994

**Notice**

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-93-2684

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION, | ) | Appeal from the Circuit Court of Cook County |
| Plaintiff-Appellant, | ) | |
| v. | ) | No. 92 L 15104 |
| WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION, | ) | Honorable Kathy M. Flanagan, |
| Defendants-Appellees. | ) | Judge Presiding. |

## ORDER

Plaintiff, Board of Managers of Winston Towers No. 4 Condominium Association, appeals the dismissal of its complaint with prejudice by the circuit court which reasoned that the doctrine of *res judicata* barred the complaint due to a prior federal court order dismissing plaintiff's federal action.

On appeal, plaintiff contends that the federal court order was premised on the court's lack of jurisdiction and thus the doctrine of *res judicata* does not apply to the substance of its complaint.

We agree with plaintiff and thus reverse the circuit court's order dismissing plaintiff's complaint.

Plaintiff manages a multi-unit condominium building located at 7033 North Kedzie Avenue. In the underlying cause of action, plaintiff seeks to recover certain repair and service costs it incurred following a fire which occurred in April 1989 and originated in the elevator control panel, causing damage to the elevator system.

Defendant Westinghouse Electric Corporation installed the elevators in plaintiff's building in 1974 and was responsible for maintaining that system prior to January 1989. In January 1989, defendant Schindler Elevator Corporation assumed responsibility to provide elevator maintenance, service and repair following its acquisition of the Westinghouse Elevator Company, a division of Westinghouse.

On May 21, 1991, Liberty Mutual Insurance Company, as subrogee of Winston Towers No. 4 Association, filed a complaint in federal court against defendant Westinghouse invoking jurisdiction based on diversity and seeking damages from the April 1989 fire. Thereafter the federal court allowed plaintiff's motion to voluntarily dismiss the complaint on September 26, 1991.

Later, the present plaintiff filed a four-count complaint in federal court, invoking diversity jurisdiction, to recover damages incurred from the same fire. Defendants moved to dismiss the complaint on two grounds: (1) failure of plaintiff to properly plead jurisdiction and (2) failure of

the pleading to state a cause of action upon which relief can be granted.

On July 9, 1992, the federal court issued a minute order together with a memorandum opinion and order. The minute order provided:

> "Enter memorandum opinion and order dismissing this complaint without prejudice for *lack of subject matter jurisdiction*. Plaintiff has until August 10, 1992 to file an amended complaint properly asserting a basis for federal jurisdiction. Failure to file by August 10, 1992 will result in dismissal with prejudice." Emphasis added.

Regarding plaintiff's failure to properly plead jurisdiction, the memorandum opinion and order stated

> "The court finds that [plaintiff] has *failed to properly allege diversity jurisdiction*. Although the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, [plaintiff] can easily file an amended complaint to sufficiently clarify the ambiguity. Since no answers have yet been filed, only a motion to dismiss, [plaintiff] may amend the complaint as of right to provide the necessary information." Emphasis added.

As to whether the complaint stated a cause of action, the memorandum and opinion thoughtfully discussed and found merit in the substance of each count, *i.e.*, breach of contract, breach of express and implied warranties, and negligence. Accordingly, defendants' motion to dismiss for failure to state a cause of action was denied as to each count.

Plaintiff did not file an amended complaint or take any other action in federal court. On September 24, 1992, the federal court issued a minute order which ruled as follows:

> "Pursuant to order entered July 9, 1992, this case is dismissed with prejudice for plaintiff's failure to file an amended complaint."

Judgment was entered with the same language and plaintiff did not appeal.

Thereafter, on December 4, 1992, plaintiff filed a complaint in the circuit court of Cook County which mirrored the federal complaint, *i.e.*, the same underlying incident (the fire), the same parties and the same allegations.

Defendants moved to dismiss plaintiff's State complaint with prejudice in accordance with section 2-619(a)(4) which provides for involuntary dismissal where "the cause of action is barred by a prior judgment." (735 ILCS 5/2-619(a)(4) (West 1992).) The federal court's dismissal order entered in September 1992, according to defendants, constituted a bar to the subsequent State action under the doctrine of *res judicata*.

Following a hearing, the circuit court granted defendants' motion to dismiss plaintiff's complaint with prejudice on July 6, 1993. At the hearing plaintiff argued that it did not amend its complaint in the federal action because of the impossibility of establishing diversity for each of the 250 condominium unit owners. Plaintiff now appeals the circuit court's dismissal with-prejudice order.

Plaintiff asserts that the federal court's September dismissal order does not constitute an adjudication on the merits and thus is not a basis for the application of *res judicata* in the State action because (1) the federal court lacked jurisdiction to enter the dismissal order; and (2) the sole basis for the federal court's dismissal was lack of jurisdiction since plaintiff failed to properly allege diversity jurisdiction.

Defendants contend that the federal court's September dismissal order constitutes an adjudication on the merits because (1) it was entered *before* the jurisdictional issue was decided and diversity jurisdiction could have been established; and (2) the sole basis for the September dismissal order was for violation of the July court order which directed plaintiff to file an amended complaint by August 10, 1992.

The doctrine of *res judicata* provides that a final judgment rendered on the merits by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. *Torcasso v. Standard Outdoor Sales, Inc.* (1993), 157 Ill. 2d 484, 490, 626 N.E.2d 225.

The three elements of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. (*Crum & Forster Corp. v. Resolution Trust Corp.* (1993), 156 Ill. 2d 384, 396, 620 N.E.2d 1073.) To rely upon a former adjudication as an absolute bar, the only questions to be determined are whether the three essential elements of *res judicata* have been satisfied and whether the former adjudication was within the jurisdiction of the court rendering it. *People v. Chicago & Illinois Midland Ry. Co.* (1994), 258 Ill. App. 3d 409, 411, 629 N.E.2d 1213.

We believe the record clearly demonstrates that the federal court, in its July 1992 orders and memorandum, ruled that it lacked jurisdiction of plaintiff's federal action. The July 1992 orders and memorandum expressly state, in relevant part, that plaintiff's complaint was "dismissed without prejudice for *lack of subject matter*

*jurisdiction.*" (Emphasis added.) Defendants' assertion that the subsequent September federal order was entered *before* the jurisdictional issue was decided totally ignores and contradicts the express language of the July order where the federal court found that it lacked subject matter jurisdiction.

Absent jurisdiction, a court cannot rule on any other matter.

> "Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. [Citations.] Any finding made by a court when the court has determined that it does not have subject mater jurisdiction carries no *res judicata* consequences." *Bunker Ramo Corp. v. United Business Forms, Inc.* (7th Cir. 1983), 713 F.2d 1272, 1279.

The sole action available to a court that concludes it has no jurisdiction is to dismiss the case without ever reaching the merits. (*Capitol Leasing Co. v. Federal Deposit Insurance Corp.* (7th Cir. 1993), 999 F.2d 188, 191; *Hawkins VMR Joint Venture v. Rowbec, Inc.* (N.D. Ill. 1993), 835 F. Supp. 1091, 1092-93, *supplemental op. sub nom. Robinson v. Robec, Inc.* (N.D. Ill. Dec. 2, 1993), No. 93 C 6893 (failure to cure jurisdictional defect in an amended complaint requires the court to dismiss the action for lack of subject matter jurisdiction).) Where the lack of jurisdiction has been adjudicated, any purported adjudication of the merits is beyond the power of the court and thus is a legal nullity. *Pacurar v. Hernly* (7th Cir. 1979), 611 F.2d 179, 181.

The July federal court order expressly stated that the federal court lacked subject matter jurisdiction. Absent jurisdiction over the case, the federal court could not

reach the merits. To hold otherwise would exalt form over substance. (See *Downing v. Chicago Transit Authority* (Ill. September 29, 1994), No. 76402.) In any event, there is no ambiguity as to the existence of a cause of action. The July memorandum and opinion clearly and expressly recognized the meritorious nature of all four counts of plaintiff's complaint. Whether plaintiff could (as argued by defendants) or could not (as argued by plaintiff) have established diversity jurisdiction is irrelevant because no jurisdiction was established. As the federal court had no jurisdiction in July, it did not magically obtain jurisdiction in September. Accordingly, we find that the dismissal of plaintiff's federal action was based on the federal court's lack of jurisdiction.

An involuntary dismissal based on lack of jurisdiction does not constitute an adjudication on the merits. This mandate applies equally in the federal forum under Rule 41(b) (Fed. R. Civ. P. 41(b)) and in the Illinois courts under section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 1992)) and Supreme Court Rule 273 (134 Ill. 2d R. 273). See also *Martin Trigona v. Gouletas* (1982), 105 Ill. App. 3d 28, 31, 433 N.E.2d 1132 ("dismissals for lack of jurisdiction [are] by definition not on the merits")).

Section 13-217 entitles plaintiff to bring a new action because the statute provides, in pertinent part, that where

> "the action is dismissed by a United States District Court for lack of jurisdiction, then, *** the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action *** is dismissed by a United States District Court for lack of jurisdiction." 735 ILCS 5/13-217 (West 1992).

The refiling statute is remedial in nature and should be construed liberally. *Roth v. Northern Assurance Co.* (1964), 32 Ill. 2d 40, 42-43, 203 N.E.2d 415; *Frankenthal v. Grand Trunk Western R.R. Co.* (1983), 120 Ill. App. 3d 409, 458 N.E.2d 530.

As an alternative reason for this court to affirm the circuit court's dismissal order, defendants now submit on appeal that plaintiff refiled its action twice, thereby violating the single refiling allowance under section 13-217. (*Flesner v. Youngs Development Co.* (1991), 145 Ill. 2d 252, 254, 582 N.E.2d 720 (section 13-217 permits only one refiling of a claim).) Defendants maintain that the instant action represents the third action filed by plaintiff based on the federal and State court actions filed by the present plaintiffs and the federal complaint filed by Liberty Mutual Insurance Company.

The record reveals that defendants did not raise the issue of improper refiling under section 13-217 in the circuit court and therefore we deem this new theory waived. See *Geaslen v. Berkson, Gorov & Levin, Ltd.* (1993), 155 Ill. 2d 223, 230, 613 N.E.2d 702; *Evans v. United Bank* (1992), 226 Ill. App. 3d 526, 530-31, 589 N.E. 2d 933.

For all the foregoing reasons, we reverse the order dismissing plaintiff's complaint with prejudice and remand the cause to the circuit court.

Reversed and remanded.

GREIMAN, J., with TULLY, P.J., and RIZZI, J., concurring.

**ORDER** **CCG-2**

**IN THE CIRCUIT COURT**
**OF COOK COUNTY, ILLINOIS**

| | | |
|---|---|---|
| Board of Managers of Winston Towers #4 | ) | |
| Plaintiff | ) | |
| v. | ) | No. 92 L 15104 |
| Westinghouse Electric Corp and Schindler Elevator Corp., | ) | |
| Defendants. | ) | |

**ORDER**

This cause coming on to be heard on defendants' motion to dismiss under §2-619, due notice having been given and the court being advised in the premises,

IT IS HEREBY ORDERED:

That defendants motion be and hereby is granted for the reasons stated in open court and this cause of action is dismissed with prejudice.

Plaintiff's oral motion for leave to file a reply, defendants having objected for lack of notice, is denied for the reasons stated in open court.

A10

JUDGE KATHY M. FLANAGAN
JUL - 6 1993
Circuit Court - 267

_____ 19__

ENTER:

/s/ Kathy M. Flanagan
Judge Judge's No.

Atty No.
Name Hinshaw & Culbertson
Attorney for Defendants
Address 222 N. LaSalle Suite 300
City Chicago IL 60601-1081
Telephone 312/704-3000

AURELIA PUCINSKI, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF ILLINOIS )
) SS:
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—LAW DIVISION

| | | |
|---|---|---|
| BOARD OF MANAGERS of WINSTON TOWER No. 4 | ) | |
| Plaintiff, | ) | |
| versus | ) | No. 92 L 15104 |
| WESTINGHOUSE ELECTRIC CORP, & SCHINDLER ELEVATOR CORP, | ) | |
| Defendants. | ) | |

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable KATHY M. FLANAGAN, one of the Judges of said Division on the 6th day of July, A. D., 1993.

PRESENT:

MR. DANIEL CELSKE and
MR. LAURENCE LEVIN,

appeared on behalf of the Plaintiffs;

MS. NANCY LISCHER,

appeared on behalf of the Defendants.

ALPHA OMEGA MARTIN, CSR
Official Court Reporter
No. 084-000966
32 West Randolph
Chicago, Illinois 60601

THE CLERK: Board of Managers.

MR. CELSKE: Daniel Celske, local counsel for the plaintiff.

MR. LEVIN: Laurence Levin, counsel for the plaintiff.

MS. LISCHER: Nancy L-i-s-c-h-e-r, counsel for both defendants.

MR. CELSKE: Your Honor, defendants have a motion to dismiss on behalf of each defendant before the court. For our oral argument this morning as a housekeeping matter before we proceed, Mr. Levin is lead counsel in this matter and practice with the firm of Cozen and O'Connor in Philadelphia. I have piggybacked a motion to allow him to practice pro hac vice for the purposes of this.

THE COURT: Is this your motion?

MR. CELSKE: I believe we have one on file, but you are welcome to that one as well.

THE COURT: I have read the defendant's 2-619 (a) 4 motion to dismiss. I have read the response, and I read the reply. Anything anybody has got to add outside what is contained in the briefs?

MS. LISCHER: Did you have a chance to read our motion to cite additional authority?

THE COURT: Yes.

MS. LEVIN: I have two things. One is a reply.

MS. LISCHER: I would like to object. I haven't seen it.

THE COURT: I don't give any—I don't allow pleadings on the date of the hearing.

MR. LEVIN: It is important to note, your Honor, that federal court, which the defendant overlooks, the federal court order specifically stated we had to establish diversity jurisdiction for each condominium unit owner. That was an impossibility.

As a result we could not file the amended complaint. Therefore this matter was dismissed because of the underlying factor is, it was dismissed because of an inability to establish jurisdiction. On the face of it, it is dismissed for lack of prosecution.

But the reason that we couldn't proceed is because we couldn't establish jurisdiction for all 250 different unit owners. Illinois courts are adamant. In fact the defendant concedes where an underlying case is dismissed for lack of jurisdiction, it is not on the merits and we can proceed.

We submit we should be permitted to proceed to establish our claim on the merits as they have yet to be decided.

THE COURT: You have got an order as of August—I am sorry it was September 24 of 1992.

MS. LISCHER: That's correct.

THE COURT: Which was a federal court order dismissing the case with prejudice for failure to file amended complaint as per the prior July 9, 1992 order, which I am assuming because I didn't really have a copy of it, that that was the order that required the diversity of all 250 condominium owners to be established, the residence in order to establish diversity jurisdiction.

That could not be done. We will accept that for the purpose of this motion. And so subsequently on September

24, the federal court enters this order dismissing the case with prejudice. I am assuming it is under federal rule of civil procedure 41 (b).

The issue here is whether or not that dismissal under federal rule civil procedures 41 (b) is a dismissal of the type and nature which bars or which operates with the res judicata effect, barring any subsequent suit in the state court.

As I said, your position is that there is no, that it isn't a bar. The second suit would not be barred because of your position that failure to establish diversity jurisdiction for the federal court is something that can be cured. I think defendant's position is that by allowing that, by allowing the second suit you are actually essentially collaterally attacking federal court. It is the same issue addressed in the Martin Trigona case.

MR. LEVIN: But your rule of civil procedure, 273, says if the dismissal is for lack of jurisdiction, it is not on the merits.

THE COURT: What you are using is a state procedure to attack, collaterally attack the procedure in the federal court.

MR. LEVIN: The cases cited uniformly find where a federal action is dismissed for lack of jurisdiction is refiled in state court. If the dismissal in federal court is for lack of jurisdiction, we have to bring the action somewhere. If we can't bring it in federal court.

THE COURT: You got stuck with September 24, 1992 order with dismissal with prejudice. If you couldn't do your diversity business sufficiently in order to have federal jurisdiction attached, then the actual result

should have probably been a voluntary dismissal in the federal court. Then you refile in state court.

The fact is that went all the way out from July 9 with nothing being done, and then the court undertakes probably a status call or some such, and enters an order dismissing it with prejudice under 41 (b); it is a quote unquote, adjudication on the merits. It is a with prejudice dismissal.

The order didn't say without prejudice, it said with. By filing in the state court under those circumstances, sure it has been done time and again when the federal court order says without prejudice. Then fine.

MR. LEVIN: The cases don't say that.

THE COURT: Yes they do.

MR. LEVIN: The cases say your Honor is obligated to consider the entirety of the record. Your Honor well understands why we couldn't file. If you consider the entirety of the record, then you understand we were dismissed because we couldn't establish jurisdiction.

Don't prejudice my client. It is not fair to prejudice my client and prevent us from pursuing the merits because procedurally I made a mistake, if that is what you are saying.

THE COURT: I am not sitting here using this record as a critique. What I am saying, procedurally I am stuck with the record as it is. I have an order in federal court dismissing the federal court case with prejudice.

MR. LEVIN: But what is the reason? The reason is because we can't establish jurisdiction.

THE COURT: I am not going to sit here and you are not going to sit here and use the state court as a forum

to attack an order in federal court. You cannot do it. The underlying philosophy is as was stated in Martin Trigona. You cannot use the state court as a forum to collaterally attack an order in the federal court which is clear on its face.

The order in federal court is a dismissal with prejudice. If there was an inability to satisfy diversity jurisdiction in the federal court, that was obviously brought by motion of the defendant that gave rise to the July 9 order.

The July 9 order gave an opportunity to file an amended complaint. That was never done. Assuming as I must from this record, I don't know if anybody went in to the federal court to ask for additional time. I don't know what was done, but it seems like nothing was done under the order of July 9.

There was a certain specified period in which to file an amended complaint establishing diversity jurisdiction. That wasn't done. It was probably kicked up on a status call some place, and the judge entered the order.

Now if no one went before the federal court to argue such dismissal with prejudice would prejudice the client for any other subsequent lawsuit, that is not my problem. I am stuck with the record as it is. I agree with the defendants' interpretation of this situation. I think this is a bar. I could be wrong, but we will see.

If I rule this way, obviously you are going to take it up. That would be fine. From the case law I read, the order in federal court, 41 (b) order, is an adjudication on the merits for purposes of res judicata, and a subsequent lawsuit filed in state court is barred.

So the 2-619 motion to dismiss is sustained. I think that disposes of everything, so it is final and appealable.

MS. LISCHER: Should I incorporate your reasoning on the record as the reasons for dismissal, or will you be entering a written order.

THE COURT: No, the reason is stated and set forth in the record.

(The case was over, whereupon Counsel Lischer came back before the bench.)

MS. LISCHER: Your Honor, may I approach? Your Honor as you know, at the beginning of this hearing, the plaintiff tendered a document that I had never seen, nor had I been served a copy with. The Court refused it and I had objected and I would like to state my objections for the record that I had lack of notice.

Your Honor, should I include something in this order that the plaintiff's proffered reply memorandum was stricken at my motion?

THE COURT: Sure. Leave to file instanter was denied.

Just for the record, the prior briefing schedule had required a response and a reply. The reply date was May 3. On the status date of May 10, I set a hearing for May 19. That was reset to June 17. June 17 it was reset again to today's date.

The time for filing a reply was long past, and there was no motion prior to today's date regarding the two prior hearing dates that requested leave to file a reply.

MS. LISCHER: Thank you.

IN THE CIRCUIT COURT
OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

I, ALPHA O. MARTIN, an Official Court Reporter for the Circuit Court of Cook County, Cook Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter transcribed the foregoing into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable KATHY M. FLANAGAN, Judge of said court.

/s/ Alpha O. Martin
Official Court Reporter

Dated this 20 day
of July, 1993

**ILLINOIS SUPREME COURT**
**JULEANN HORNYAK, CLERK**
**SUPREME COURT BUILDING**
**SPRINGFIELD, ILL. 62706**
**(217) 782-2035**

June 1, 1995

Ms. Nancy G. Lischer
Hinshaw & Culbertson
222 N. LaSalle St., S#300
Chicago, IL 60601-1081

No. 78441 - Board of Managers of Winston Towers No. 4 Condominium Association, respondent, v. Westinghouse Electric Corporation et al., petitioners. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 23, 1995.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Patricia Jean Prange
Hinshaw & Culbertson
222 North LaSalle Street
Suite 300
Chicago, IL 60601-1081

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Case Number: 1:91-cv-03147

Title: Liberty Mutual Ins. v. Westinghouse Elec

Assigned Judge: Honorable Suzanne B. Conlon

MINUTE ORDER of 7/2/91 before Honorable Suzanne B. Conlon: Plaintiff fails to appear. Status hearing held. Defendant's motion for an extension of time to August 5, 1991 to answer or otherwise plead is granted. [7-1] Discovery is ordered closed and all dispositive motions are to be filed by November 4, 1991. Parties are to submit the joint pretrial order on November 26, 1991 at 9:00 a.m. Case is placed on the December trial calendar. Plaintiff is advised that failure to appear at future hearings will result in dismissal for want of prosecution. Notice mailed 7/3/91.

This order was entered on the docket by the Clerk July 3, 1991

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Patricia Jean Prange
Hinshaw & Culbertson
222 North LaSalle Street
Suite 300
Chicago, IL 60601-1081

---

Case Number: 1:91-cv-03147

Title: Liberty Mutual Ins v. Westinghouse Elec

Assigned Judge: Honorable Suzanne B. Conlon

MINUTE ORDER of 9/3/91 before Hon. Suzanne B. Conlon: Plaintiff having failed to file a response to the motion to dismiss, defendant's unopposed motion to dismiss the complaint in its entirety is granted. [9-1] terminating case Notice mailed 9/4/91.

This order was entered on the docket by the Clerk September 4, 1991

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure. It was generated by the automated docketing system being introduced to handle the civil dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION, | ) RECEIVED<br>) APRIL __ 1992<br>) H. STUART CUNNINGHAM<br>) UNITED STATES |
| Plaintiff, | ) DISTRICT COURT |
| vs. | ) Civil Action No. 92 C 0478 |
| WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION, | ) Judge John A. Nordberg |
| Defendants. | |

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

I. Preliminary Statement

A. Factual Background

For purposes of resolution of this motion, plaintiff will accept defendants' introductory statement with certain qualifications.

Westinghouse installed the elevators in the building originally, and from 1974 up to and including the date of the fire maintained an exclusive service contract for them. No other entity did any repair or service work on the electrical components of the system at any time.

With this in mind, plaintiff notes that Westinghouse's description of the subject agreement as merely one for maintenance of the premises' elevators implies some sort of limited relationship insofar as it concerns those elevators. To the contrary, the agreement itself stipulates

that no other individual or entity other than Westinghouse is permitted to make any alterations, additions, adjustments, repairs or replacements to the equipment. Plaintiff retained basic operational responsibilities only and an obligation to warn users and Westinghouse of operational problems, malfunctions or accidents; all responsibility for seeing to it that the mechanical aspects of the system worked correctly devolved to Westinghouse.

Immediately following the fire, which was determined to be of electrical origin, Westinghouse personnel disposed of all fire damaged components, thereby preventing plaintiff from determining what specific component failed and how, and, depending on its age, even who was responsible for its installation and service. Westinghouse ultimately did all the repairs and replacements to the elevator system.

B. Legal Background

F.R.Civ.P. 12 serves "to expedite and simplify the pretrial phase of . . . litigation while at the same time promoting the *just* disposition of cases" (emphasis added). Wright & Moore's Federal Practice and Procedure, vol. 5A (1991) (hereinafter "Wright") §1342, p. 161. In resolving defendant's Rule 12 motion, the court must accept all facts alleged in the complaint and draw all reasonable inferences from the pleadings in plaintiff's favor; the court may dismiss plaintiff's claim *only* if it is clear that no relief can be granted under any set of facts which could be proved consistent with the allegations. *Gillman v. Burlington North.R.Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989); *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989).

Finally, plaintiff notes that by attaching evidentiary material to its motion, defendant has converted the

12(b)(6) aspects of its motion to a motion for summary judgment. *Crawford v. U.S.*, 796 F.2d 924 (7th Cir. 1986); therefore, the question for the court becomes whether defendant has shown that there is no genuine issue as to any material fact and that it is entitled to summary judgment as a matter of law on its 12(b)(6) arguments. *Crawford* at 927.

II. Legal Argument

A. THE BOARD OF MANAGERS IS AUTHORIZED TO BRING THIS ACTION ON BEHALF OF THE CONDOMINIUM ASSOCIATION WHICH REPRESENTS THE INDIVIDUAL UNIT OWNERS AND DIVERSITY JURISDICTION HAS BEEN PROPERLY PLEADED

The Board has standing to bring an action on behalf of the Condominium Association which represents individual owners. The Illinois Condominium Property Act mandates that "[t]he board of managers shall have standing and capacity to act in a representative capacity in relation to matters involving the common elements or more than one unit, on behalf of the unit owners, as their interests may appear." Ill. Rev. Stat. ch. 30, para. 309.1 (b) (1963); *see also Briarcliffe West Townhouse Owners Assoc. v. Wiseman Construction Co.*, 118 Ill. App.3d 163, 454 N.E.2d 363, 367 (1983); *St. Francis Courts Condominium Assoc. v. Investors Real Estate*, 104 Ill.App.3d 663, 432 N.E.2d 1274, 1276 (1982). Thus, defendant's argument that all the unit owners must have the requisite diversity jurisdiction is vacuous, at best. Indeed, carrying that argument to its [il]logical extreme would require that every unit owner would have to join in any action to recover for damage to any common ele-

ment. The statute obviates the need for any such time-consuming, costly endeavor.

The Defendant's Motion also calls for plaintiff's complaint to be dismissed because plaintiff has not properly alleged diversity jurisdiction in its complaint.

It is important to note that the defendant is *not* saying that the court lacks jurisdiction, only that there is an omission of a few particular words the defendant deems critical to satisfy its interpretation of pleading requirements. In short, there is no actual controversy, there is only a dispute elevating form above substance.

As the *Crawford* case, supra, makes clear:

> If the defendant thinks the Court lacks jurisdiction . . . his proper course is to request an evidentiary hearing on the issue . . . [h]e can and should support the request with affidavits or other documents that might obviate the need for oral testimony. . . Often the only evidence necessary to resolve a jurisdictional issue is documentary, as in a diversity case. . . [O]nce the district judge has *reason to believe* that there is a serious jurisdictional issue, he is obliged to resolve it before proceeding to the merits. . . *Id.* at 928-929 (emphasis added).

Here, plaintiff submits that there is no reason to believe that there is a jurisdictional issue at all, let alone a "serious" one. Specifically, defendant argues that jurisdiction fails due to the fact that plaintiff has not identified the principal place of business of the Board. To the contrary, reading plaintiff's complaint as a whole, it is readily apparent that plaintiff has identified itself in terms of the interests it represents and the specific physical location of those interests. Therefore, there can be no doubt where plaintiff resides for jurisdictional purposes.

Even assuming plaintiff has failed to properly plead jurisdiction, plaintiff submits it is apparent that it could have used the order of words defendant would prefer, and that it is not seriously at issue that in fact such jurisdiction exists; therefore, it would be improper to dismiss plaintiff's complaint on this basis. *Hoefferle Truck Sales v. Divco-Wayne*, 523 F.2d 543 (7th Cir. 1975). If there is an actual question, as *Crawford* makes clear, the court may take evidence on the question. See, *Grafon Corp. v. Hauserman*, 602 F.2d 781 (7th Cir. 1979). Moreover, any such error can be corrected by amending the complaint under Federal Rule of Civil Procedure 15(a) to provide the missing information.

* * *

[Part of original document, from pages 5-18 (R. C140-53), is deleted]

* * *

III. Conclusion

12(b)(6) motions are generally disfavored by the courts, and it is the movant's burden to demonstrate that no claim has been presented. Moore's p. 12-63. Such a motion should be denied unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Moore's p. 12-65. It is important to note in this regard that to survive a 12(b)(6) motion plaintiff need not correctly categorize the legal theories giving rise to its claims, it must merely allege facts upon which relief can be granted. *Rathbone v. Rathbone*, 683 F.2d 914 (5th Cir. 1982).

Defendant's motion essentially concedes that there is no substantive issue as to whether jurisdiction lies with

this court; instead, Westinghouse has created an issue predicated on choice of language. Defendant also must concede that language in the service agreement cannot be, as it states, baldly dismissed as creating no express warranties.

More troubling are defendant's request to dismiss plaintiff's case because of a $1,000 discrepancy in the damage amounts set forth in the ad damnum clauses in plaintiff's complaint and defendant's request to dismiss plaintiff's tort causes of action premised on "economic loss". Even a cursory review of the law which controls both these issues reveals that there is no bona fide issue for defendant to argue about.

In any event, plaintiff's allegations demonstrate that it has a viable claim against defendants; and, defendant has not established that it is entitled to dismissal as a matter of law. Therefore, Westinghouse's 12(b)(6) motion should be denied. *Wright* §1357 p. 344, 345. As for the 12(b)(1) motion Westinghouse has filed, plaintiff submits that Westinghouse has conceded there is no genuine issue on the jurisdictional matter, only a stylistic one. Therefore, this motion, too, should be denied: the just disposition of this matter is to let the triers of fact decide responsibility.

SANCHEZ AND DANIELS

BY: /s/ Manual Sanchez
MANUEL SANCHEZ, ESQUIRE
333 West Wacker Drive
Suite 810
Chicago, IL 60606
(312) 641-1555

and

COZEN AND O'CONNOR

BY: /s/ Laurence M. Levin
LAURENCE M. LEVIN
1900 Market Street
The Atrium-Third Floor
Philadelphia, PA 19103
(215) 665-2016

Minute Order Form

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**

**Name of Assigned Judge or Magistrate Judge** JOHN A. NORDBERG

**Sitting Judge if Other Than Assigned Judge** _____

**Case No.** 92 C 0478 **Date** July 9, 1992

**Case Title:** BOARD OF MANAGERS ET AL. V. WESTINGHOUSE ELECTRIC ET AL.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

**MOTION:** _____

**DOCKET ENTRY:**

(1) [ ] Filed motion of [use listing in "MOTION" box above]

(2) [ ] Brief in support of motion due _____

(3) [ ] Answer brief to motion due _____
Reply to answer brief due _____

(4) [ ] Ruling on _____ set for _____ at ____
[ ] Hearing

(5) [ ] Status hearing [ ] held [ ] continued to
[ ] set for [ ] re-set for
_____ at _____

(6) [ ] Pretrial conf. [ ] held [ ] continued to
[ ] set for [ ] re-set for
_____ at _____

(7) [ ] Trial [ ] Set for [ ] re-set for
_____ at _____

(8) [ ] Bench Trial [ ] Jury Trial [ ] Hearing held and continued to _____ at _____

(9) This case is dismissed
[ ] without [ ] with prejudice and without costs
[ ] by agreement
[ ] pursuant to
[ ] FRCP 4(j) (failure to serve)
[ ] General Rule 21 (want of prosecution)
[ ] FRCP 41(a)(1)
[ ] FRCP 41(a)(2)

(10) [x] **(Other docket entry)**
**Enter memorandum opinion and order dismissing this complaint without prejudice for lack of subject matter jurisdiction. Plaintiff has until August 10, 1992 to file an amended complaint properly asserting a basis for federal jurisdiction. Failure to file by August 10, 1992 will result in dismissal with prejudice.**

(11) [x] [For further detail see
[ ] order on the reverse of
[x] order attached to the original minute order form.]

* * *

IN THE UNITED STATES OF AMERICA
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| BOARD OF MANAGERS OF WINSTON TOWERS NO. 4 CONDOMINIUM ASSOCIATION, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 92 C 0478 |
| WESTINGHOUSE ELECTRIC CORPORATION and SCHINDLER ELEVATOR CORPORATION | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

Plaintiff, Board of Managers of Winston Towers No. 4 Condominium Association ("Winston"), brought this diversity action against defendants Westinghouse Electric Corporation ("Westinghouse") and Schindler Elevator Corporation ("Schindler"). Winston entered into an agreement with Westinghouse to provide maintenance service for elevators Westinghouse had installed in 1974 at 7033 North Kedzie Avenue, Chicago, Illinois. This address is the location of the property that the plaintiff has the authority to manage. As of January 1989 Schindler assumed responsibility to provide all elevator service following its acquisition of the Westinghouse Elevator Company, a division of Westinghouse. Around April 22, 1989, a fire originated in the elevator control panel and caused damage to the entire elevator system. Winston seeks to recover the cost of repair and/or replacement of the damaged equipment, which amounted

to $27,924 for emergency and temporary repairs and $168,000 for permanent repairs. In addition, Winston claims reimbursement of $13,592.65 for the cost incurred in providing temporary elevator service to the Association's members.

The complaint is in four counts. Count I states a cause of action against Westinghouse for breach of contract. Count II seeks recovery based on breach of express and implied warranties in the contract. Count III of the complaint states a claim of negligence against Westinghouse for failing to perform in a reasonable manner, while Count IV states a similar cause of action against Schindler. Westinghouse has moved to dismiss the complaint under Rules 12(b)(1) and 12(b)6) of the Federal Rules of Civil Procedure.

## ANALYSIS

Winston first contends that by attaching evidentiary material to its motion, Westinghouse has converted the 12(b)(6) motion to a motion for summary judgment. Federal Rule of Civil Procedure 12(b)(7) states that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed.R.Civ.P. 12(7). However, the only materials attached to the motion are the original complaint and a copy of the contract in dispute. ". . . A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed.R.Civ.P 10(c). The contract included in Westinghouse's motion is referred to in Winston's pleading and is the subject matter of the entire complaint.

Since no matters outside the pleading were presented to the court, the motion is appropriately treated as a 12(b)(6) motion to dismiss.

Westinghouse and Schindler move to dismiss the entire complaint on the grounds that Winston has not properly pled jurisdiction. The contention is that Plaintiff has not pled the status of Winston Towers as either an association or a corporation, making it impossible to determine jurisdiction on the face of the pleading.

To properly plead the citizenship of a corporation, Winston must assert the state of incorporation and its principal place of business. 28 U.S.C. Section 1332(c); *Jason's Foods, Inc. v. Peter Eckrich & Sons., Inc.*, 768 F.2d 189, 190 (7th Cir. 1985). If Winston is not suing as a corporation, the relevant citizenship for diversity purposes is that of the individual owners. *National Association of Realtors v. National Real Estate Association, Inc.*, 894 F.2d 937, 939 (7th Cir. 1990). In addition, if the injury suffered is to all the owners or to the common elements, the citizenship of the individual owners must be pled to properly allege diversity jurisdiction. *Id.*

Winston argues that the Illinois Condominium Property Act makes these assertions unnecessary. While the Act does give the Board standing to sue in a representative capacity, it does not create federal jurisdiction and cannot circumvent the requirements of Article III. *National Association of Realtors*, 894 F.2d at 940-41.

The court finds that Winston has failed to properly allege diversity jurisdiction. Although the requirements of diversity jurisdiction may conceivably be inferred from the pleadings, Winston can easily file an amended complaint to sufficiently clarify the ambiguity. Since no

answers have yet been filed, only a motion to dismiss, Winston may amend the complaint as of right to provide the necessary information. Fed.R.Civ.P. 15(a); *Jafree v. Barber*, 689 F.2d 640, 642n.2 (7th Cir. 1982).

## I. Count I—Breach of Contract

In Count I, Winston Towers alleges that Westinghouse materially breached its contract in that it failed to provide elevator maintenance services in a reasonable and prudent manner. Winston attributes the 1989 accident to these contractual breaches by Westinghouse.

Westinghouse contends that Count I should be dismissed because the maintenance agreement contains express language which bars recovery for fire damage and for consequential or incidental damages. Under the subheading "Loss, damage, or delay" the contract states that "[w]e will not be liable for loss, damage, detention, or delay resulting from causes beyond our reasonable control, including, . . . fire." The second clause that Westinghouse relies upon is under the subheading "Responsibility," and provides that Westinghouse "will not be responsible for special, indirect, incidental or consequential damages." Westinghouse contends that the fire damage to the elevator system is consequential damage flowing from the alleged breach.

Exculpatory clauses will not be construed as indemnifying a party for its own negligence unless the contract contains express language or clear and unequivocal language indicating the intention of the parties was to that effect. *Rutter v. Arlington Park Jockey Club*, 510 F.2d 1065, 1066 (7th Cir. 1975). Moreover, these clauses are not favored and are construed strictly against the party relying on them. *Id.*

The first exculpatory clause is only applicable if the losses were due to causes beyond Westinghouse's "reasonable control." Nothing in Winston's complaint contends that the cause of the fire was outside the "reasonable control" of Westinghouse. Notwithstanding this, the clause still does not clearly and explicitly exempt Westinghouse from liability. The intent behind the clause is sufficiently ambiguous that the contract does not unequivocally express the intent to absolve Westinghouse of responsibility for the consequences of its own negligence.

Westinghouse further asserts that the claim is for consequential damages and is precluded by a provision in the contract providing that Westinghouse should have no liability for any special, indirect, or consequential damages. The recovery sought for the damage to the elevator and cost of repairs is not consequential damage flowing from the breach of contract, but is damage to the actual subject matter of the contract. However, the $13,592.65 sought for the cost of providing temporary elevator service was incurred as a consequence of the breach of contract and is not recoverable because the explicit language of the contract exonerates Westinghouse from this type of liability.

Westinghouse also argues that Count III should be dismissed for failure to sufficiently allege the defects or the actions of Westinghouse that were a breach of the contract. Although Winston does not state precisely what acts or omissions of Westinghouse caused the fire, they have put Westinghouse on sufficient notice of the nature of the claim as required under Rule 8 of the Federal Rules of Civil Procedure. Particularly in light of the fact that the available evidence was disposed of by Westing-

house, Winston should be given the opportunity to proceed with discovery to establish sufficient facts to support its claim. Winston has adequately set forth a claim for breach of contract, and the exculpatory clauses do not prevent it from pursuing this claim, with the exception of the $13,592.65 sought for consequential damages. Accordingly, the motion to dismiss Count I is denied.

## II. Count II—Breach of Express and Implied Warranties

Winston contends that in maintaining and servicing the elevator system, Westinghouse expressly or impliedly warranted that it would remain in proper working order and would remain fit for its intended use. Westinghouse moves to dismiss this count on the grounds that no express warranties exist in the contract, and no implied warranties exist because Illinois law does not recognize implied warranties in a service contract.

While Westinghouse contends that Winston has asserted no contractual language which expressly warrants the quality of its work, no particular words must be used if it is clear that the parties intended a warranty. *Rehr v. West*, 76 N.E. 2d 808, 333 Ill.App. 160 (1948). A warranty is "a statement or representation made by the seller of goods, . . . having reference to the character, quality, or title of the goods, by which he promises or undertakes that certain facts are or shall be as he then represents them." *Vasco Trucking Co. v. Parkhill Truck Co.*, 6 Ill.App.3d 572, 286 N.E.2d 383, 386 (4th Dist. 1972). Further, an express warranty in a contract is to be interpreted in a manner that is consistent with the clear and natural import of the language used and in consideration of the subject matter. *Ill. Valley Asphalt v. LaSalle Nat. Bank*, 54 Ill.App.3d 317, 369 N.E.2d 525, 529 (1977).

Winston has a plausible claim that the language in the "conditions of service" section of the contract amounts to an express warranty by making assertions as to the level and quality of Westinghouse's work. Since the language of the contract is susceptible to Winston's interpretation and the complaint sets forth facts in support of the claim which would entitle Winston to relief, Count II should not be dismissed on the basis that no express warranties exist.

Westinghouse also contends that count II should be dismissed because implied warranties are limited to the sales of goods and do not attach to the performance of services. Westinghouse argues that an implied warranty of workmanlike conduct exists only in a service contract. However, the distinction between a "warranty" and an "implied term of workmanlike conduct," which Westinghouse finds "crucial," is a tenuous one. In *Altevogt v. Brinkoetter*, 421 N.E.2d 182, 186, 83 Ill.2d 44 (1981), the court stated that Illinois law has recognized that a service contract may carry an implied undertaking that the job will be performed in a reasonably workmanlike manner. Nevertheless, the court did not espouse a distinction between this and a warranty, but instead stated that "[t]his undertaking is often spoken of as a 'warranty'." *Id.* See also *Stewart Warner Corp. v. Burns International Security Services, Inc.*, 343 F.Supp. 953, 954 (N.C.Ill. 1972). Therefore, Winston should have the opportunity to demonstrate that an implied warranty existed in the elevator maintenance contract, and the motion to dismiss Count II is denied.

## III. Count III and IV—Negligence

Counts III and IV allege negligence in failing to exercise reasonable care and skill to properly maintain, test, or service the electric system in the elevator.

Westinghouse and Schindler move to dismiss Counts III and IV on the ground that they seek recovery of economic damages in tort, which are barred under the *Moorman* economic loss doctrine. *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443, 444 (1982). As a result of the distinct functions served by tort and contract law, economic losses, due to disappointed commercial expectations, are more appropriately protected by contract law. *Id.*

Although *Moorman* speaks in terms of product liability, the doctrine applies to services as well as products. *Oak State Products v. Ecolab*, 755 F. Supp. 235 (C.D. Ill. 1991); *Ganton Technologies, Inc. v. Quadion Corp.*, 755 F.Supp. 203, 207 (N.D. Ill. 1990) ("the Moorman doctrine can be applied to negligence claims in connection with products or services. . ."). "Economic loss" has been defined as damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property. *Moorman*, 435 N.E. 2d at 444.

Winston contends that there has been damage to "other property" because a specific component was not properly maintained, but the resulting damage was to the entire elevator system. However, the contract was for maintenance of the elevator system, and that is exactly what was damaged due to the alleged negligence of Westinghouse. Therefore, the damage does not fall within the ambit of "other property" and is economic in nature.

Winston also argues that economic damages are recoverable because the claim falls within an exception to *Moorman*. Illinois law has recognized that *Moorman* does not preclude recovery of economic damages where the damage is the result of a sudden and calamitous occurrence. *Moorman*, 435 N.E.2d at 443 ("[t]ort theory is appropriately suited for personal injury or property damage resulting from a sudden and dangerous occurrence . . ."); *Bi-Petro Refining Co. v. Hartness Painting, Inc.*, 120 Ill. App. 3d 556, 458 N.E. 2d 209 (4 Dist. 1983); *Vaughn v. General Motors Corp.*, 102 Ill. 2d 431, 466 N.E. 2d 195 (Ill. 1984). See also *Scott and Fetzer Co. v. Montgomery Ward*, 493 N.E. 2d 1022, 112 Ill.2d 378, 388, (1986). A plaintiff may recover in Illinois for physical injury to the product itself or other property that results from a sudden or dangerous occurrence caused by an alleged defect that poses a serious risk of harm to people and property. *Id.*

A sudden and calamitous fire may be a proper type of occurrence from which to bring an action in tort. *American Drug Stores v. AT&T*, 222 Ill.App.3d 153, 583 N.E.2d 694, 695 (1991). The complaint alleges that due to Westinghouse's negligent performance of the maintenance agreement, a sudden and dangerous fire erupted in the elevator and posed a serious risk of harm to people and property. These losses fall within the ambit of the sudden and calamitous exception to the *Moorman* doctrine. Therefore, if Winston can prove liability, the cost of repairing the elevator system is properly recoverable in tort. Accordingly, the motion to dismiss the negligence allegation in Counts III and IV is denied.

For the foregoing reasons, defendant's motion to dismiss is granted in part and denied in part. The com-

plaint is dismissed without prejudice for lack of subject matter jurisdiction. Plaintiff shall have thirty days to file an amended complaint properly asserting a basis for federal jurisdiction. Failure to file within thirty days will result in dismissal of plaintiff's claim.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

DATED: July 9, 1992

Minute Order Form

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**

**Name of Assigned Judge or Magistrate Judge** JOHN A. NORDBERG

**Sitting Judge if Other Than Assigned Judge** _____

**Case No.** 92 C 478 **Date** September 24, 1992

**Case Title:** BOARD OF MANAGERS V. WESTINGHOUSE ELEC. ET AL.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd-party plaintiff, and (b) state briefly the nature of the motion being presented.]

**MOTION:** _____

**DOCKET ENTRY:**

(1) [ ] Filed motion of [use listing in "MOTION" box above]

(2) [ ] Brief in support of motion due _____

(3) [ ] Answer brief to motion due _____
Reply to answer brief due _____

(4) [ ] Ruling on _____ set for _____ at ____
[ ] Hearing

(5) [ ] Status hearing [ ] held [ ] set for _____ [ ] continued to [ ] re-set for _____ at _____

(6) [ ] Pretrial conf. [ ] held [ ] set for _____ [ ] continued to [ ] re-set for _____ at _____

(7) [ ] Trial [ ] Set for _____ [ ] re-set for _____ at _____

(8) [ ] Bench Trial [ ] Jury Trial [ ] Hearing held and continued to _____ at _____

(9) This case is dismissed
[ ] without [ ] with prejudice and without costs
[ ] by agreement
[ ] pursuant to
[ ] FRCP 4(j) (failure to serve)
[ ] General Rule 21 (want of prosecution)
[ ] FRCP 41(a)(1)
[ ] FRCP 41(a)(2)

(10) [x] **(Other docket entry)**
**Pursuant to order entered July 9, 1992, this case is dismissed with prejudice for plaintiff's failure to file an amended complaint.**

(11) [ ] **[For further detail see**
**[ ] order on the reverse of**
**[ ] order attached to the original minute order form.]**

* * *

□ 450 (Rev 5) Judgment in Civil Case ®

# United States District Court

NORTHERN DISTRICT OF ILLINOIS
Eastern Division

BOARD OF MANAGERS

JUDGMENT IN A CIVIL CASE

V.

WESTINGHOUSE ELEC. ET AL.

CASE NUMBER: 92 C 478

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this case is dismissed with prejudice pursuant to the order entered July 9, 1992 for plaintiff's failure to file an amended complaint.

September 24, 1992
Date

H. STUART CUNNINGHAM
*Clerk*

/s/ E. PAUSBACK
(By) Deputy Clerk

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